Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. 82-993

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALAN PATRICK,

Petitioner,

v.

CITY OF AKRON, STATE OF OHIO

Respondent

BRIEF OPPOSING WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS FOR SUMMIT COUNTY, OHIO

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STATEMENT OPPOSING WRIT OF CERTIORARI

The Writ of Certiorari ought not be granted merely to review evidence or inferences drawn from it. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938).

BRIEF OPPOSING JURISDICTION OF APPELLANT

PROPOSITION OF LAW NO. I:

The Court did not err in determining that the search warrant affidavit set forth probable cause to believe that a search of the Appellant's home would disclose the various items, the seizure of which was authorized thereby, and in concluding that the search made of, and the seizures made from the home here involved were in fact reasonable.

Probable cause for the search of 978 Wooster Avenue, was established by the Affidavit for Search Warrant. Probable cause was gained by police surveillance of numerous suspected "numbers runners" including Charles Roberson whose route began and ended at 978 Wooster Avenue, the home of Alan Patrick. That surveillance, coupled with other information is sufficient to authorize the search.

"Affidavit for Search Warrant, page 29.

"(106) Affiant has knowledge through the reading of the surveillance report submitted by Det. Smith, Det. Hill, and Det. Barath on April 2, 1981, that the following incidents took place on that date:

"(a) At 2:30 p.m., Charles Roberson arrived at Alan Patrick's residence (978 Wooster Avenue).

"(b) At 2:50 p.m., Roberson left Patrick's home with two passengers and went to the following locations and seemed to be delivering something at each of the following addresses:

* (1) 300 block of Trigonia

(2) 507 Rhodes Avenue

(3) 548 Douglas Street (See page 2, paragragh 4)

* (4) Nathan Street, between Thornton Street and Bowery Street.

* (5) Sheck Street (address unknown)

(6) S&S Tire Company, on Wooster Road in Barberton, just past the City limits. He dropped off his two passengers at this stop.

* (7) Roslyn Avenue

* (8) Greenwood Avenue

* (9) Winton Avenue

(10) Returned to Wooster Avenue at 4:45 p.m.

"Page 28. (104) The Affiant has knowledge through the reading of a confidential report submitted by Det. Randy Barath that the following took place on April 1, 1981:

"(a) At 12:03 p.m., a white over black Cadillac, known to be owned by Robert Thomas, was parked in front of 38 North Howard Street.

"(b) At 12:09 p.m., Charles Roberson arrived at 36 North Howard Street.

"(c) At 12:22 p.m., Charles Roberson left North Howard Street and drove to City Hospital, arriving at 12:26 p.m.

"(d) At 12:31 p.m., Charles Roberson left City Hospital and drove to 204 Division Street, arriving at 12:36 p.m.

"(e) At 1:09 p.m., Robert Thomas arrived at 204 Division Street driving his Cadillac.

"(f) At 1:32 p.m., both Thomas and Roberson left Division Street, at the same time. Roberson drove to 1138 Joy Avenue, arriving there at 1:44 p.m.

"(g) At 1:49 p.m., Roberson left 1138 Joy Avenue and went to Angelo's Bar at Howard and Lods Streets, arriving at 2:00 p.m.

"(h) At 2:07 p.m., Roberson left Angelo's Bar and drove to 978 Wooster Avenue, arriving at 2:35 p.m.

"(i) At 2:55 p.m., Roberson left 978 Wooster Avenue with a black male as passenger.

"(105) Affiant has knowledge through the reading of the surveillance report by Det. W. R. Smith on April 1, 1981, that the following incidents took place that date:

"(a) At 12:20 p.m., a heavy-set black female in her mid-forties came down to the lobby of City Hospital and went to the window and looked around as if she was looking for someone.

"(b) At 12:25 p.m., Charles Roberson came in the front door and started to talk to the woman. Det. Smith heard the following quote: 'Are you sure that your count was right?' 'I'm right,' she replied and he then said that 'It better always be right.' She handed him a small amount of papers and took some pills from a small brown pill bottle and handed them to him. With that he left.

"Page 27. (102) The Affiant has knowledge through the reading of the surveillance reports submitted by Det. Hill, Det. Barath, and Det. Smith that the following incidents occurred on March 31, 1981:

"(a) At 11:15 a.m., Charles Roberson was spotted at 38 North Howard Street driving Buick, OSL #LVK 875.

"(b) At 12:22 p.m., Roberson went to the Arch Street entrance of City Hospital where he parked his car and went

inside of the hospital for several minutes, He left the hospital and drove to 204 Division Street.

"(c) At 1:04 p.m., Charles Roberson left 204 Division Street and returned to 38 North Howard Street.

"(d) At 1:58 p.m., Charles Roberson left North Howard Street and went to 26 East Lods Street where he parked his car and went into the house, and then went from there to the rear door of Angelo's Bar at the corner of Howard and Lods.

"(e) At 2:42 p.m., Charles Roberson was seen arriving at 978 Wooster Avenue.

The addresses on Roberson's routes were also placed under surveillance and information establishing them as gambling houses was gained.

"Affidavit for Search Warrant

"Page 27 (103) The Affiant has knowledge through the reading of the confidential report submitted by Det. Joe Barclay on March 31, 1981, that the following incidents took place on that date:

"(a) Det. Barclay was asked to watch the activities as 36 and 38 North Howard Street. At 36 North Howard Det. Barclay observed a black male tell one of the barbers the number that he wanted to play and handed the barber a $10.00 bill. The barber then left and returned in about ten minutes. He then gave the man back his change for the ten dollars.

"(b) At approximately 3:30 p.m., at 38 North Howard Street there were approximately ten to twelve persons playing cards. There was no one playing pool. Det. Barclay overheard one person state "don't mention anything about numbers, that guy is a policeman'.

"Page 22. (93) The Affiant has knowledge through the reading of the surveillance report submitted by Det. Sgt. Lauer and Det. Contos that the following took place on March 4, 1981:

"(a) At 12:55 p.m., Charles Roberson arrived at 135 Tarbell Street driving his Buick, #LVK875. He went into the house and at 12:57 he went back to his car and left. Roberson drove to 204 Division Street where he stayed until 1:20 p.m.

"Page 13. (73) The Affiant has knowledge that Joseph Tolliver was arrested for Keeper of a place for Gambling on June 7, 1979, and was found 'Guilty' of that offense by Judge Colopy on April 14, 1980.

"Page 26. (100) Affiant has knowledge from reading the surveillance report submitted by Det. W. R. Smith and Det. Beitzel that the following incidents occurred on March 24, 1981:

"(a) At 2:40 p.m., a car later to be identified as the one belonging to Charles Roberson arrived at Alan Patrick's house on 978 Wooster Avenue.

"Page 13. (76) The Affiant has knowlege through the reading of a surveillance report submitted to him by Det. W. R. Smith on January 22, 1981, that 'the biggest numbers' man in Akron is Alan Patrick'. He received some of his bets through Ruby Calhoun. Alan Patrick is known to be living on the west side and also owns the red brick apartments at Fourth and Chittenden Streets, Akron, Ohio.

"(a) Affiant checked the phone number that was posted on the property at Fourth and Chittenden Streets, the sign read 'For Lease — 376-7641' and found it was listed as being the phone number of Sandra Patrick at 978 Wooster Avenue.

"(b) Det. W. R. Smith gained this information through Information Source Number WRS 81-1. This information source has proved to be reliable previously."

The above references, coupled with information contained with the Affidavit for Search Warrant on each of the "players," connects the 978 Wooster Avenue address, with the gambling operation with sufficient certainty to establish probable cause to search those premises for evidence of gambling as specified in the Warrant.

The Affidavit for Search Warrant for

978 Wooster Avenue, Akron, Ohio, is distinguished from the insufficient affidavit detailed in Spinelli v. U.S., 393 U.S. 410 (1969), in several ways. The Spinelli affidavit relied almost entirely upon an informant's tip. In the case at bar, months of surveillance of numerous "runners," was coupled with trash pickups and the linking of information about gambling at certain locations with a pattern of traveling around the city making 2- and 3-minute stops at these locations.

Charles Roberson was observed traveling to and from 978 Wooster Avenue on his way to these locations. The picking up of trash by and the in-house observations by police officers, indicated that the locations to which each of the runners traveled were engaged in gambling. One such location was 978 Wooster Avenue, the residence of Alan Patrick.

An Affidavit for a Search Warrant should be analyzed from a common sense point of view and in its entirety in determining its sufficiency, State v.

Furry, 31 Ohio App. 2d 107 (1971).

In a surveillance of a bookmaking operation wherein a number of officers from several different law enforcement agencies participated, the Ohio Supreme Court said.

"In sum we hold that the totality of the facts presented within the affidavit and the surrounding circumstances amply justify a finding of probable cause for issuing the warrant here..." State v. Thomas, 61 Oh. St. 2d 223, 15 Oh. Ops. 3d 234, 238 (1980)

In speaking of probable cause for the issuance of a search warrant the Supreme Court has said that:

"...only the probability and not a prima facie showing of criminal activity is the standard of probable cause." Beck v. Ohio, 85 Sup. Ct. 223 at 228 (1964).

In McCray v. Illinois, 87 Sup. Ct. 1056, 1062 (1967) it was said:

"...affidavits of probable cause are tested by much less rigorous standards than those governing the admissability of evidence at the trial."

A presumption in favor of the regularity of the issuance of the warrant exists, Rosanski v. State, 106 Ohio State 422; Howe v. State, 39 Ohio App. 78.

The Court in U.S. v. Manufacturers National Bank, 536 F.2d 699 (6th Cir.) (1976), held:

"In determining what is probable cause, the Commissioner is not called upon to determine whether the offense charged has in fact been committed. [Citing U.S. v. Eisner, 297 F.2d 595, 597 (6th Cir.) cert. denied, 369 U.S. 859 (1962)]. The magistrate to whom an application for a search warrant is presented must apply common sense standards [Citing U.S. v. Ventresca, 380 U.S. 102 (1965)]; and when a determination of probable cause has been made, it is entitled to great deference by reviewing courts. [Citing Spinelli v. U.S., 393 U.S. 410, 419 (1969)]." Jones v. U.S., 80 Sup. Ct. 725 (735-736) (1960).

The warrant authorizes a search and seizure of gambling paraphernalia. Plaintiff submits that the seizure of the computers was lawful as gambling paraphernalia based on the following facts which existed at the time of the search and as testified to at the motion hearing:

EXAMINATION OF OFFICER ALEXANDER:

Q. Did you also see some computers in the house?

A. Yes.

Q. Can you describe what you saw on the

computer screen?

A. On the screen ... there was a lot of things that I didn't understand. There was a printing that said advances, declines and changes.

Q. What did that indicate to you?

A. That someone had an interest in the stock exchange.

Q. Do you know any other reason to use those numbers?

A. Illegal lottery is taken from the New York Stock Exchange.
(S.H. p. 46)

CROSS-EXAMINATION OF OFFICER ALEXANDER:

Q. Officer, did I understand you correctly that when you saw these computers there was something visible on these computers.

A. The changes, advances, declines.

Q. Something visible to you?

A. Yes, sir.

Q. There's no question in your mind about that?

A. That there was something visible on the screen?

Q. Yes.

A. No, there is no question.
(S.H. p. 49)

Further, Defendant's wife, Sandra Patrick, testified that she was operating one of the subject computers when the police entered the room (S.H. p. 33). Additionally, defense witness Barry Brown testified that the computer was on at the time the officers entered and that there was something showing on the screen of the computer (S.H. p. 78, 79).

Three witnesses testified that the computer was activated at the time of the search. Thus, in deciding whether there was probable cause to seize the computers based on what was visible on the screen, the trier of fact must consider the sufficiency of the testimony of a trained officer and the weight of the testimony of defendant's witnesses.

Plaintiff further contends that although the computers were not specifically designated in the

warrant, the aforementioned facts support the contention that there was reasonable cause at the time of the search to believe they were instrumentalities of the offense charged:

"The legality of a seizure of items other than those specifically described in a search warrant depends on the relationship of the article to the crime being investigated and on reasonable cause to believe that the item was relevant to, or an integral part of the instrumentality of the crime, or a means of committing the offense charged. State v. Fields, 29 Ohio App. 2d 154 (1971) (Hdnte 4) Citing U.S. v. Russo, 250 F. Supp. 55 (1966) and U.S. v. Stern, 225 F. Supp. 187.

"Evidence not described in a valid search warrant but having a nexus with the crime under investigation may be seized at the time the described evidence is seized." U.S. v. Kane, 450 F.2d 77, 85: (1971) Cert. denied 92 Sup. Ct. 954 (1972).

When circumstances make an exact description of instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking, and it is sufficient if the items are identified in the warrant as precisely as their nature will permit. James v. U.S., 416 F.2d 467, 473 (1969) Cert. denied 397 U.S.

902 (1970).

It has been said that if the purpose of the search is to find a specific item of property it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property; whereas on the other hand if the purpose is to seize not a specific item of property, but any property of a specified character which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and may be described generally as to its nature or character People v. Schmidt, 473 P.2d 698, 700 (1970).

Plaintiff contends that the seizure of the safety deposit box key is analogous to the seizure of the computers. Said search was lawful in that there was probable cause to believe that it was evidence of an illegal gambling operation. As stated above, there is authority to seize items which may not be particularly designated in the warrant but may bear a

relationship to the purpose of the search.

The case of U.S. v. Manufacturers Bank, supra, presents facts that are applicable to the case at bar. In Manufacturers, a warrant was issued to search for evidence relating to illegal gambling. Approximately $3,000.00 in currency was located in the residence. During the course of the search of the defendant's residence, who was described in the affidavit as the "banker" for a numbers operator, Defendant James Wingate remarked that he had a safety deposit box but that he did not keep the key on the premises. He stated that the safety deposit box was at Manufacturers' Bank but did not disclose the location. Subsequently, the officers found in the residence a receipt for payment for a safety deposit box. Further investigation showed that the box, as indicated on the receipt, was closed and a larger box (No. 127) opened in the names of Azalia Wingate, wife of James Wingate, and Toni Wingate, daughter of James Wingate.

A search warrant was issued for safety deposit box No. 127 and the search yielded $502,200.00 in currency. A motion was made by Azalia Wingate and Toni Wingate for return of the property seized from the locked box. The Wingates argued that there was no probable cause for the search of the residence and that all information pertaining to the safety deposit boxes was derived from this search and should be suppressed as "fruit of the poisonous tree." Alternatively, they argued that even if the first search was lawful, the search of the safety deposit box was unlawful in that the affidavit for the search of the box was based on evidence discovered in the search of the residence. They contend that the magistrate could not rely on the first affidavit to cure deficiencies as to probable cause in the second affidavit.

Finding sufficient probable cause in the first affidavit, the Court held that the magistrate was entitled to consider the first affidavit in conjunction

with the second one presented the following day. The second affidavit referred specifically to the search warrant which the magistrate had issued the previous day. The court stated:

"It would needlessly restrict the discretion of a magistrate to hold that two affidavits filed so close in time and referring to a single criminal investigation which was still continuing could not be considered together in determining whether to authorize a further search. Manufacturers, supra, at 702."

The Court further noted that when read together, the two affidavits provided the basis for a reasonable inference that evidence of the numbers operation would be found in the safety deposit box and noted that "A magistrate may draw 'the usual inferences which reasonable men draw from evidence.'" Citing Johnson v. United States, 333 U.S. 10, 14 (1948).

During the course of the search of 978 Wooster Avenue, in addition to gambling paraphernalia, currency in the amount of $12,000.00 was found in a safe. Next to the currency was a safety deposit box

key. The officer seized the key based on the reasonable belief that additional currency would be found in the box. His belief was based on the size of the gambling operation as gleaned from prior observation and the fact that the key was found next to the currency. A second warrant was issued to search the safety deposit box. The affidavit from the first warrant was incorporated by reference in the affidavit for the second warrant.

The Plaintiff asserts that the $122,000.00 in currency found in the safety deposit box can be linked to illegal gambling and as in Manufacturers and Johnson, supra, the issuing judge could consider both affidavits together and draw the usual inferences which a reasonable man would draw from the evidence.

PROPOSITION OF LAW NO. II:

There is sufficient evidence as a matter of law to support the guilty verdicts in this case.

There was very minimal evidence of a viable full-time real estate business being transacted at 978 Wooster Avenue. Certainly, no evidence of such large scale operations requiring a computer, much less a second one.

It is alleged that the money taken from the safe deposit box was the life savings of Minnie Gooden. If one were to believe that Minnie Gooden would forego a 13% return on over $100,000 in today's money markets, the presence of the money still has not been satisfactorily explained. At the motion to suppress, (S.H. p. 12), we learn that the key to the safe deposit box was kept in a safe in the home of Alan Patrick. So Minnie Gooden must go to her son-in-law and into a safe to get to her own property (a key) to get to her life savings. Bear in mind, she does not live with the Patrick family.

How reasonable is it to believe the $122,600 in the safe deposit box was hers when the institution's record disclosed forty-three visits to this box during the contract term - forty-two by Sandra Patrick and one by Sgt. Lauer a policemen and none by her. (S.H. p. 11)?

The evidence for the state was a coalescence of direct and circumstantial quality buttressed by technical testimony deciphering the computer information.

One case held that it was error to strike an officer's testimony as to the meaning of letters and figures appearing on betting markers and similar documents admitted in evidence, where the officer was qualified by experience to give expert testimony on such matter. People v. Newman, 148 P2d 4, 7 (1944).

An inference is nothing more than a permissible deduction based upon the facts existing in evidence, and the jury (judge) is at liberty to find the ultimate

fact to be inferred one way or the other as it may be impressed by the testimony (emphasis added). Such a permissible inference does not violate due process as long as the evidence necessary to raise the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. State v. Nelson, 272 N.W. 2d 817, 819 (1978).

State v. Nabozny, 54 Ohio St. 2d 195 8 Ohio Ops. 3d 181, 186 (1978) was a case in which the Ohio Supreme Court refused to overturn a conviction where there was sufficient evidence of such a conclusive and persuasive force presented to the jury for it to determine on the facts, as it found them to be that there was no reasonable hypothesis other than guilt. emphasis added.

State v. Graven, 54 Ohio St. 2d 114 8 Ohio Ops. 3d 113 (1978) at page 118:

> "Thus where circumstantial evidence is relied upon to prove elements of the crime, as in the case 'sub judice,' the jury must find it to be of such a conclusive and persuasive force that it excludes every reasonable hypothesis of innocence."

Quoting Holland v. U.S., 384 U.S. 121, 140 (1954):

"Circumstantial evidence in this respect is intrinisically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result yet this is equally true of testimonial evidence, In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities."

Appellant's Appendix E is the finding of Judge Murphy at the conclusion of the trial heard by him after also hearing the suppression motion a few months earlier. His finding furnishes the reasons for conviction.

The defense claimed that the $12,000 found in his home by police was payment from the City of Akron, but offered no evidence in support thereof.

CONCLUSION

Illegal gamblers do not shout to the world their activity. Because of the illegaility, one attempts to escape detection. Successful detection and prosecution of offenders will often, as in this case, require close, prolonged scrutiny of one's actions, words, and contrived use of otherwise legitimate artifacts. The law must be applied to the particular fact pattern. One should not be permitted to go free because the case is not 100% bottomed on direct evidence, but instead is partially dependent or lawfully admitted inferences pointing inescapably to unlawful activity.

The 4th Amendment permits reasonable searches and seizures. In an electronic age born so soon after and co-existing with an age of extreme mobility by automobiles, the courts should not abdicate their responsibility to apply the law as dictated by the particular fact pattern before it. The

imaginative devices of an enterprising criminal ought not dazzle nor overwhelm the trier of fact to the point of escaping punishment.

Respondent requests denial of the Writ of Certiorari.

Respectfully submitted,

Robert D. Pritt
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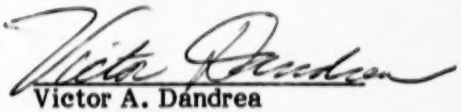

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